IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12179 of 2000

with

SPECIAL CIVIL APPLICATION No 11618 of 2000

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GUJARAT STEEL & AGRICO IND
Versus
UNION OF INDIA

Appearance:
MR PARESH M DAVE for Petitioner No. 1
MR ASIM J. PANDYA for Respondents

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE RAVI R.TRIPATHI

Date of decision: /09/2001

C.A.V. JUDGEMENT

(Per : CHIEF JUSTICE MR DM DHARMADHIKARI)

#. A common question of law is involved in these two Special Civil Applications. The question is whether the cash amount appropriated for non-production of excisable goods provisionally released pending adjudication for payment of excise duty in accordance with Bond executed in prescribed Form B-11 under Rule 206 of the Central Excise Rules, 1944 r.w. Rule 173Q of the said Rules framed under the Central Excise Act, 1944 (hereinafter referred to as `the Rules' and `the Act' respectively), is liable to be refunded on settlement of the case by payment of 50% of the duty leviable on the goods under the Kar Vivad Samadhan Scheme, 1998 (hereinafter referred to as `the KVS Scheme') which is part of Chapter IV of Finance Act No.2 of 1998?

#. The facts relevant for deciding the legal question posed are as under:-

On 3-6-1997, a team of Central Excise Officers visited the petitioners' factories and raised cases of classification of the ginning machines. 36 big machines and 38 small machines were seized by the Officers during investigation.

#. On 3-7-1997 74 machines were provisionally released in favour of petitioners by the Commissioner of Central Excise on condition of execution of Bond in the prescribed Form B-11 for an amount of Rs. 20 lacs with cash security of Rs. 5 lacs and also on payment of Central Excise Duty at the time of clearance of these machines.

#. In pursuance of the above provisional release, the petitioner firm furnished a Bond in Form B-11 for Rs. 20 lacs and also furnished cash security of Rs. 5 lacs by way of Fixed Deposit Receipt. The machines were thereafter released and the same were removed by the petitioners on payment of duty thereon.

#. On 8-9-1987, a show cause notice was issued to the petitioners proposing to recover Excise Duty in the sum of Rs. 62,18,376/- and proposing to confiscate 74 machines, with penalty on the petitioner firm and its partners.

#. After conducting the regular adjudication, the Commissioner of Central Excise passed an order-in-original dated 14-10-1998 confirming the demand

of duty for the sum of Rs. 22,16,426/- in one case and Rs. 3,26,538/in another. He also imposed penalty of Rs. 22,16,426/-. The Commissioner also held that 74 machines were liable for confiscation, but since they were provisionally released during the adjudication, he made an order for appropriation of the cash security of Rs. 5 lacs in lieu of confiscation of these goods. A personal penalty of Rs. 1 lac was also imposed on the partner of the petitioner firm.

#. The petitioner firm filed 2 separate appeals before Custom, Excise and Gold (Control) Appellate Tribunal (CEGAT) against the imposition of duty, penalty and appropriation of the amount of cash security in lieu of confiscation of the goods.

#. During the pendency of these appeals in the year 1998 KVS Scheme was introduced vide Chapter IV of the Finance Act No.2 of 1998. The Scheme allowed settling of the tax disputes by the parties by offering them discount or concession in the matter of payment of tax arrears of assessees.

#. On 17-12-1998, the petitioners filed two separate declarations that they were eligible for availing the Scheme as the `tax arrears' in their cases arose by way of a show cause notice issued prior to the appointed date, i.e. 31-3-1998 fixed in the KVS Scheme and as `tax arrears' were not paid, the benefit of KVS Scheme was available to them.

##. On 2-2-1999, the Commissioner of Central Excise issued a certificate in Form 2-B and determined the amount of Rs.12,71,482/- as amount of settlement as against amount of duty, penalty and redemption fine in case of the petitioner firms. Pursuant to the above order under the KVS Scheme, the petitioner firm paid the amount determined by Challan on 3-3-1999 and a final certificate for satisfaction of dues has been issued in his favour on 14-5-1999. On 18-6-1999 the petitioner firms made a formal representation to the Commissioner of Central Excise praying for refund of the amount of Rs.5 lacs appropriated as cash security furnished by Bond. In the representation it was stated that since the two cases under the Act were duly settled under the KVS Scheme on payment of 50% of the duty payable, the cash security appropriated in terms of the Bond was liable to be refunded to the petitioner. By the impugned communication dated 29-8-2000, the petitioner was informed by the Office of the Commissioner of Central Excise that the cash security of Rs. 5 lacs,

appropriated for breach of conditions of Bond in prescribed Form B-11, is not covered by KVS Scheme and cannot be returned. The aforesaid communication in two cases has given rise to these two writ petitions under Article 226 and 227 of the Constitution.

##. Learned counsel Shri Paresh M. Dave appearing for the petitioner submits that the declaration under the KVS Scheme was filed by the petitioner firm on 17-12-1998. At that time the security of Rs. 5 lacs which was furnished by way of FDR was still lying with the petitioners bankers. The amount of Rs. 5 lacs was recovered by the Excise Department from the bankers only on 4-3-1999 when the amount under the FDR was realised and credited to the Excise Department. The learned counsel invites attention of the Court to the language used in the definition of "tax arrear" in clause (m) of Section 87 of the KVS Scheme, 1998. The Central Excise is indirect tax. Sub clause (ii) of clause (m) of Section 87 is attracted. The relevant provision Section 87(m)(ii)(a) and (b) with Explanation appended thereunder is for interpretation before us. The same is quoted hereunder:-

"87. Definitions.-In this Scheme, unless the context otherwise requires,-

(a) to (l) xx xx xx xx

(m)"tax arrear" means,-

(i) xx xx xx xx xx

(ii)in relation to indirect tax enactment,-

(a) the amount of duties (including drawback of duty, credit of duty or any amount representing duty), cesses, interest, fine or penalty determined as due or payable under that enactment as on the 31st day of March, 1998 but remaining unpaid as on the date of making a declaration under section 88; or

(b) the amount of duties (including drawback of duty, credit of duty or any amount representing duty), cesses, interest, fine or penalty which constitutes the subject matter of a demand notice or a show-cause notice issued on or before the 31st day of March, 1998 under that enactment but remaining unpaid on the date of making a declaration under section 88,

but does not include any demand relating to erroneous refund and where a show-cause notice is issued to the declarant in respect of seizure of goods and demand of duties, the tax arrear shall not include the duties on such seized goods where such duties on the seizured goods have not been

qualified.

Explanation.-Where a declarant has already paid either voluntarily or under protest, any amount of duties, cesses, interest, fine or penalty specified in this sub-clause, on or before the date of making a declaration by him under section 88 which includes any deposit made by him pending any appeal or in pursuance of a court order in relation to such duties, cesses, interest, fine or penalty, such payment shall not be deemed to be the amount unpaid for the purposes of determining tax arrear under this sub-clause;"

##. Section 88 provides a period within which KVS Scheme can be availed by the parties for settlement of their cases on payment of 50% of the dues. In cases where a notice has already been issued for the dues in accordance with Section 88, the time prescribed for making declaration for availing KVS Scheme is between 1-9-1998 to 31-12-1998.

##. For the purpose of availing the KVS Scheme, under provisions of Section 87(m) r.w. Section 88 of the said Scheme, the requirement is that on the date of declaration which is to be made within the stipulated period, `tax arrears' which may include duty, cesses, interest, fine and penalty should have "remained unpaid". On the provisions of Section 87 and 88 of the KVS Scheme, the contention advanced by the learned counsel for the petitioners is that the order of appropriation of the cash security furnished by the petitioner by way of FDR of the bank cannot be held to be a "payment" and therefore the fine amount was "unpaid" on the date of making declaration on 17-12-1998. Learned counsel referred to the word "payment" from dictionaries like Corpus Juris Secundum, Black's Law Dictionary and relied on the decision in the case of Jagannath Prasad v. Mahabir Ram Kumar and another AIR 1955 Patna 231.

##. The alternative submission made on behalf of the petitioners is that the order of appropriation of the cash security which forms part of the order-in-original was passed on 14-10-1998 i.e. before filing of the declaration in KVS Scheme on 17-12-1998, and since the cash amount which was lying with the Bank in the FDR was actually realised by the Excise Department on 4-3-1999, it has to be held that on the date of making declaration the fine amount was a `tax arrear' within the definition of clause (m) of Section 87 of the KVS Scheme. Very strong reliance has been placed on the decision of Allahabad High Court in case of Uttar Pradesh State

Mineral Development Corporation vs. Additional Commissioner of Incometax and others (1999) 238 ITR 669. It is argued that if an All India Statute has been interpreted by one High Court in a reasonable manner, for the sake of uniformity and consistency in the application of taxing statutes, the other High Courts normally should follow the precedent. Observations to the same effect in the decision of Gujarat High Court in J.D. Patel and another v. Union of India and others 1978 E.L.T. (J 540) have been relied.

##. Learned counsel Shri Asim Pandya appearing for the respondents representing the Excise Department contends that the cash security in the prescribed Form B-11 was furnished in favour of President of India. Under the conditions of the Bond, the petitioner agreed that the Government shall be at liberty to appropriate the said deposit towards duty levied and/or penalty or other lawful charges as may be assessed by competent authority. Reliance has been placed on Rule 211 of the Rules for the submission that the cash security was appropriated in lieu of confiscation of excisable goods which the assessee failed to produce in terms of the Bond. Such appropriated amount in lieu of confiscation vests in the Central Government in accordance with Rule 211. On behalf of the Department learned counsel submitted that the cash security which is furnished in the name of President and appropriated by order made on 14-10-1998 having vested in the Central Government on the date of filing declarations i.e. 17-12-1998, the said cash security which was already recovered cannot be treated to be a "tax arrear" within the definition of Section 87(m) of the KVS Scheme. It is submitted that in fact the point is clearly covered by the Division Bench decision of this Court on similar facts in Appollo Tyres Ltd. & Anr. vs. Union of India and ors. XLI(3) 2000(3) GLR 2027.

##. After hearing the learned counsel for the parties, we have come to the conclusion that the contention advanced on behalf of the petitioner for claiming refund cannot be accepted and the petitions deserve to be dismissed. The cash security appropriated as fine in lieu of non-production of goods which were liable for confiscation, cannot by any stretch of language of clause (m) of Section 87 of KVS Scheme be treated to be "tax arrear". In order to understand the nature of cash security and the legal effect of appropriation of the same, a few provisions of Central Excise Rules and the contents of the statutory form of the Bond B-11 are required to be taken note of. Rule 173Q provides that if

any manufacturer removes any excisable goods in contravention of the provisions of the Rules, all such goods shall be liable for confiscation. As the facts mentioned above, on a dispute of classification of the manufactured goods, certain number of machines were seized pending adjudication of the excise duty on the same. The goods so seized were released in accordance with subrule (3) of Rule 206. The said Rule reads:-

"RULE 206. Disposal of things seized. -
(1) and (2) xx xx xx xx
(3)Anything seized by a Central Excise Officer may, pending the order of the adjudicating Central Excise Officer, be released to the owner on taking a Bond from him in the proper Form, with such security as the Commissioner may require."

##. The goods were released on furnishing of a Bond (with security) in prescribed Form B-11. The relevant part of the Bond states:-

"And whereas the said officer has required the obligor(s) to deposit as guarantee for the amount of this Bond the sum of ..... rupees in cash; the securities as hereinafter mentioned of a total face value of rupees .... endorsed in favour of the President of India and accepted on his behalf by the Commissioner, Deputy Commissioner or Assistant Commissioner of Central Excise, namely:-

##. The other relevant part of the Bond reads:-

"And I/We agree that the Government shall be at liberty to appropriate the said deposit towards the payment of the amount of duty/value/penalty/other lawful charges, as may be assessed by the competent authority in respect of the goods"

##. Rule 211 of the Central Excise Rules is also relevant. It reads as under:--

"RULE 211. On confiscation, property to vest in Central Government, (1) When anything is confiscated under these Rules, such things shall thereupon vest in Central Government.
(2) The officer adjudging confiscation shall take and hold possession of the things confiscated, and, every officer of Police, on the requisition

of such officer, shall assist him taking and holding such possession."

##. The above quoted Rule makes it clear that the property confiscated vests in the Central Government on the date of confiscation. Here, the cash amount has been appropriated in lieu of confiscation of the excisable goods which were not produced for confiscation in terms of the Bond. The cash amount therefore vests in the Central Government as an effect of the provisions of Rule 211 read with the prescribed Bond in Form B-11. As is to be seen from the above quoted provisions of the Central Excise Rules and the Forms prescribed thereunder, the cash security was furnished by endorsing the FDR in favour of the President, in terms of the Bond. On the date of passing of the order of appropriation of the cash security, the amount of the FDR vested in the Central Government as an effect of Rule 211 of the Rules. Merely because the cash amount was actually realised from the bank and credited to the Excise Department on a date subsequent to the filing of declaration that cannot be held to be a fact to support the contention, that on the date of order of appropriation or confiscation dated 14-10-1998 the cash security had still to be confiscated or recovered. The amount of cash security lying in the FDR in the name of President having already vested in the Central Government, subsequent collection of the cash amount could not make the amount lying with the bank as unrecovered on the date of making declaration. The decision of Patna High Court is distinguishable as it was in relation to an order of attachment made under Order XLI, Rule 54, C.P.C. and the said provisions are not comparable with the provisions of the Act and the Rules.

##. The other argument that since the cash security was appropriated and not paid it would still be a "tax arrear" within the definition of Section 87(m) of the KVS Scheme has also no force. Much emphasis has been laid by the counsel on behalf of the petitioner on the use of expression in clause (a) of subclause (ii) of clause (m) of Section 87 "but remaining unpaid". From the use of this expression what is being contended is that it would not cover the amount appropriated forcibly. The explanation appended below the definition of "tax arrear" in clause (m) of Section 87 negatives the contention advanced that it is only voluntary payments which are intended to be covered in the expression "but remaining unpaid". The Explanation states that amounts paid voluntarily or under protest and paid by way of deposit pending an appeal shall be deemed to be "amount paid" and not "amount remaining unpaid". The Explanation appended

to clause (m) of Section 87, therefore, is a clear pointer that amounts either paid or recovered on the date of declaration cannot be treated as amounts remaining unpaid. On almost similar facts such argument was rejected by the Division Bench of this Court in the case of Apollo Tyres (supra) which applies on all fours to the facts of the present case. We respectfully agree with the following observations made in the said decision on the interpretation of Explanation below subclause (ii) of Clause (m) of Section 87:

> "7. ..... Resorting to this explanation, it was contended on behalf of the petitioners that it did not cover security. This contention cannot be accepted in view of the fact that since the cash security was already appropriated towards fine, that amount cannot thereafter be treated as cash security. In fact, the explanation clearly supports the idea that it is only the amounts which remained unpaid that can be considered as "tax arrears" for the purpose of determination under the Scheme and that what was paid up and recovered, was not to constitute the subject-matter of any such determination.
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> 7.1 The contention that under clause (f)(ii) of Sec. 88, which relates to settlement of tax payable, prescribing the rights at which the liability under the Scheme is to be imposed, had the effect of obliterating the initial liability from the Order-in-Original as regards penalty, interest or fine as if they were never imposed, is wholly misconceived. This submission overlooks the meaning of the expression "tax arrears", which, as noted above, does not include any amount which has been paid up or recovered. The expression "tax arrears" includes only the "remaining unpaid amount", which means that it contemplates a situation where a part of the liability may have been already discharged either by voluntary payment or by recovery. Therefore, an amount of fine which was already recovered would not reckon for consideration as tax arrear in determining the liability under sub-clause (ii) of clause (f) of Sec. 88, which is 50 percent of the duty amount on the payment of which the benefit of not paying the penalty, interest or fine remaining unpaid would accrue to such assessee. This surely will not have the effect of reviving any claim to recover any amount of penalty, fine or interest which is already paid up."

##. It is not necessary for us to go into the dictionary meaning of the words "payment" and "appropriation". In our view the provisions of KVS Scheme have to be construed in a manner as to fulfil the object of the Scheme. The Scheme was challenged in the Delhi High Court and was upheld in All India Federation of Tax Practitioners v. Union of India 1998(104)E.L.T.595(Del.). In upholding the vires of the Scheme contained in the Finance Act No.2 of 1998, due notice was taken of the object of the Scheme contained in the speech of the Finance Minister when the Bill was moved. The object of the Scheme reads as under:-

"Litigation has been the bane of both direct and indirect taxes. A lot of energy of the Revenue Department is being frittered in pursuing large number of litigations pending at different levels for long periods of time. Considerable revenue also gets locked up in such disputes. Declogging the system will not only incentivise honest tax payers, enable Government to realise its reasonable dues much earlier but coupled with administrative measures, would also make the system more-user friendly. I, therefore, propose to introduce a new Scheme called Samadhan."

##. From the above object of the Scheme, it is clear that it was intended to declog the system and recover early the amount of tax locked up in disputes in litigation at several stages. On 50% of payment of dues the cases were proposed to be settled for the mutual benefit of the assessees and the Department. From the object of the Scheme, we do not find any intention that the amounts recovered towards duty or fine were proposed to be refunded on settlement of tax arrears on half payment. The intention of the KVS Scheme was only to recover early the disputed tax arrears on payment of 50% of the dues. We are, therefore, clearly of the opinion that the interpretation, as has been sought to be placed on the KVS Scheme on behalf of the petitioner by construing the definition of "tax arrear" in the manner as is sought to be done would be defeating the object of the Scheme. Such an interpretation advanced on behalf of the petitioners, therefore, cannot be accepted.

##. We are also not impressed by the argument that for the purpose of uniformity and consistency, the decision of Allahabad High Court in the case of U.P. State Mineral Development Corporation (supra) should be relied. As we have mentioned above, the point is squarely covered

by the Division Bench decision of our own Court in Apollo Tyres (supra). In the Allahabad High Court decision, there is no detailed discussion of the provisions contained in the Explanation to Section 87(m). Since the Allahabad High Court decision does not contain a detailed reasoning and since the point of law is covered by the decision of our own High Court, we cannot rely upon the decision of the Allahabad High Court in the name of uniformity and consistency in application of provisions of Central Act.

##. In conclusion we answer the legal question raised on behalf of the petitioners against them and dismiss both the Special Civil Applications but without any order as to costs.

Rules issued in both the Special Civil Applications are discharged.

(D.M. DHARMADHIKARI, C.J.)

(RAVI R. TRIPATHI, J.)

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